CZECH REPUBLIC

Permanent Mission of the Czech Republic to the United Nations

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Report of the International Law Commission on the work of its 72nd session:
Immunity of State officials from foreign criminal jurisdiction
Sea-level rise in relation to international law

Statement by

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Madam / Mr. Chair,

Concerning the topic "**Immunity of State officials from foreign criminal jurisdiction**", the Czech Republic would like to express its appreciation to the Special Rapporteur, Ms. Concepción Escobar Hernández, for her eighth report on the jurisdiction of international tribunals, settlement of disputes and good practices. We would like to briefly comment on these issues, as well as on the draft procedural articles 8 *ante* to 12 [13] provisionally adopted by the Commission at this session.

As regards draft article 18, it seems to be clear that the draft articles do not apply to the autonomous regimes of international criminal tribunals, which are established by special instruments with their own rules and scope of application. Draft article 18 simply restates this obvious fact. In our opinion, this provision does not imply any precedence of the jurisdiction of international tribunals and cannot create any new obligations or exemptions to immunity for States, which are not bound by these instruments. Therefore, in our opinion, the provision can be included in the draft as another "without prejudice" clause.

Concerning draft article 17 on the dispute settlement, we stated previously that we *do not* support the suggestion to include in the draft articles a mechanism for the settlement of disputes between the forum state and the State of the official. As observed by the Special Rapporteur and a number of other members of the Commission, such an inclusion would only be relevant if the draft articles were intended to become a treaty. We can indicate already at this stage that, from our point of view, this would *not* be an appropriate outcome of the work on this topic. In our opinion, any provision on the settlement of disputes, if retained in the draft, could only serve as a potential *non-binding guidance* on how to resolve disputes in this area.

My delegation would now like to make some comments on provisionally adopted draft articles concerning procedural guarantees included in Part Four of the draft articles. At this stage, we would like to limit ourselves to a few general remarks.

First, we note that both types of immunity, *ratione personae* and *ratione materiae*, exist as a matter of international law. Therefore, competent national authorities involved in criminal proceedings should, *ex officio*, take into consideration any applicable immunity on the basis of available evidence. In addition, the question of immunity has to be examined at an early stage of proceedings, *in limine litis*, as soon as the authorities of the forum state become aware that immunity of foreign official may be affected.

We would like to point out that the immunity *ratione personae* becomes relevant as soon as a foreign State official is affected by the exercise of criminal jurisdiction of another State. On the other hand, immunity *ratione materiae* applies *only when* the acts of the foreign official performed in his official capacity become the subject-matter of the proceedings before foreign courts. Thus, in the vast majority of cases, foreign State officials enjoying immunity *ratione materiae* may be fully subject to the criminal

jurisdiction of foreign States without any immunity being applicable. However, the draft articles included in Part Four seem to focus mainly on the exercise of foreign jurisdiction against officials covered by immunity *ratione personae*. Therefore, we suggest that the draft appropriately take into account possible differences between the procedural steps, which may be relevant for the regime of immunity *ratione personae* on the one hand, and for the regime of the immunity *ratione materiae* on the other hand.

As regards draft article 9 (on notification of the State of the official), article 10 (on invocation of immunity), and article 12 (on request for information), we are not convinced that the Commission took sufficiently into account state practice, including national laws on criminal procedure and different applicable treaties for international cooperation and mutual legal assistance. Such laws and treaties form the basis for communication and cooperation of States in these cases. We would like to reiterate that we do not expect and would not consider it appropriate for the Commission to formulate new, binding procedural obligations in this area. In our opinion, the draft procedural provisions should be regarded only as potential recommendations to States. At the same time, these provisions should be more focused on the application of the rules of criminal procedure contained in national laws and relevant international treaties.

Finally, commentary to draft article 11 deals, *inter alia*, with the possibility that a waiver of immunity may be deduced from obligations imposed on States by treaty provisions. In this regard, we would like to reiterate our previous position that international conventions on the prevention and punishment of serious crimes imply that immunity *ratione materiae* is *not* applicable in relation to such crimes in proceedings before foreign courts. In our opinion, this conclusion is *not* a result of an implied waiver, as suggested in the Commission's commentary. Rather, non-applicability of immunity *ratione materiae* in such cases is a consequence of normative incompatibility of such immunity with express definitions and obligations provided for in these treaties. At the same, it has to be emphasized that immunities *ratione personae* remain untouched and applicable before foreign courts even in cases of the exercise of jurisdiction under these conventions.

Madam / Mr. Chair,

Concerning the topic "**Sea level rise in relation to international law"**, the Czech delegation follows with interest the work of the study group, namely the discussions which took place on the basis of the issues-paper prepared by the Co-chairs, Mr. Bogdan Aurescu and Ms. Nilüfer Oral.

The international community faces numerous and complex challenges resulting from the climate change leading to sea-level rise and subsequent coastal changes. Undoubtedly, there is also a legal dimension of this problem. In order to contribute to legal stability, certainty and predictability in dealing with these challenges, it is of paramount importance that the work of the Commission and its study group on this topic proceed in strict

adherence to the existing legal regime of the law of the sea, in particular the 1982 Convention of the Law of the Sea.

It is equally important that such work take duly into account practice of the broadest possible number of coastal States. We therefore note with appreciation that several coastal States responded to the Commission's invitation to provide information on their practice regarding "Sea level rise in relation to international law" and submitted their written comments. It is also our hope that other coastal States will follow this example.

Thank you, Madam / Mr. Chair.